

Appl. No. 10/765,364  
Amendment dated 4/1/05  
Reply to Office Action of December 1, 2004

### **REMARKS/ARGUMENTS**

Claims 1-4 remain in this application. Claim 1 has been amended to further clarify that the vacuum at the lips of the clam shells seals the web to the claim shells to form the air tight chamber and maintain the exhaust path from the interior of the food item package.

#### **Claim Rejections - 35 U.S.C. §103**

Claims 1-4 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Sato et al. (US 4,633,654) in view of Sandberg (US 4,308,710). Sato '654 teaches the use of a two part frame with an interrupted rubber seal forming air vents at the interrupted locations. Sato '654 relies on these air vents to exhaust the air from the within the bag. Sato '654 does not teach that the bag should be held open and Sato '654 does not teach that the exterior of the bag should be sealed to the two part frame. Thus, Sato '654 allows the pressuring air between the exterior of the bag and the two part frame to be compromised because it may be exhausted through the air vents. Furthermore, Sato '654 applies air pressure within the frame to the top of the exterior of the bag at a location next to the air vents. This application of air pressure can force the bag to one side of the vents and then seal the bag opening. This will then vent the interior compressed air within the frame through the air vents without optimizing the amount of air removed from the bag. In contrast to Sato '654, the present invention applies a vacuum to the exterior of the bag to seal the bag to the clam shells. This provides an air tight chamber that is not taught by Sato '654. This air tight compartment within the closed clam shell ensures that the air pressure inside the clam shells is fully applied to the exterior of the bag without leaking past the lips. This helps to optimize air removal from the interior of the bag. Furthermore, the present invention ensures that an air removal passageway is held open to the interior of the bag such that the air is properly removed from the interior of the bag. Sato neither teaches nor suggests this type of design and does not provide any means or suggestion for a combination with any other reference that performs these functions.

Sandberg '710 then teaches the use of a vacuum applied at the exterior of a glove box housing to seal to the interior of a bag. Sandberg '710 then applies a slight vacuum to the interior of the bag to ensure that leaks of hazardous materials are contained. Sandberg '710 uses the mechanical presence of the glove box to hold the bag open from the inside. After teaching the application of this mechanical glove box to the inside of the bag, Sandberg '710 then teaches the use of a vacuum pull to seal the inside of the bag to the exterior of the glove box. In complete contrast to Sandberg '710, the present invention uses a vacuum to seal to the exterior of the bag to the interior of the clam shells. While Sandberg '710 teaches the interior sealing of the bag to then pull a slight vacuum on the bag, Sandberg never teaches or suggests the exterior sealing of the bag or the forming of an air tight compartment on the exterior of the bag. These distinctions become critical in a form fill and sealing machine, especially in one used for food item packaging. Sandberg '710's problems are most easily noted by the in depth procedure associated with the bag change out as noted in Column 4, line 66 through column 5 line 20. This is a slow and awkward process that would not be suitable for a continuously operating form, fill, and seal type of machine. Thus, Sandberg '710 does not teach or suggest the exterior seal and clam shells of the present invention.

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Finally, Applicant respectfully notes that it is improper to combine these references without a teaching, motivation, or suggestion found in the prior art for combining the references. As noted by the substantial authority covered in MPEP § 2145, § 2143.01, and the decisions of the Federal Circuit, it is improper to use the present application as a means for suggestion for combining the prior art references. No cited references showing a motivation for a ‘skill in the art’ combination or any reference with a ‘means of suggestion’ has been cited for combining any of these patents. “Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found in the references themselves or in the knowledge generally available to one of ordinary skill in the art.” MPEP § 2143.01 (citing *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988)). Nowhere does this rejection particularly identify any suggestion, teaching, or motivation to combine the prior art references, nor is there a specific findings concerning the identification of the relevant art, the level of ordinary skill in the art, the nature of the problem to be solved, or other findings to support a proper obviousness analysis. See *In re Dembiczak* 50 U.S.P.Q. 1614, 1618 (CAFC 1999). None of the prior art patents have taught or suggested this particular design as defined in the claims because none of these patents teach the exterior application of the vacuum to hold the bag open and also provide a sealed air compartment on the bag’s exterior. Because it is improper to use the present application as a means for suggestion for combining the prior art, applicant respectfully requests reconsideration and withdrawal of the obviousness rejection of claims 1-4.

Applicant respectfully requests that a timely Notice of Allowance be issued in this case.

Pursuant to 37 C.F.R. §1.136(a), Applicant herewith petitions the Commissioner to extend the time for responding to the December 1, 2004 Office Action for 1 month from March 1, 2005 to April 1, 2005. Applicant encloses herewith a check in the amount of \$60.00 made payable to the Commissioner of Patents and Trademarks for the petition fee.

Respectfully submitted,

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